

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-4153

01-19-1981

B) SJ

United States Court of Appeals
FOR THE SECOND CIRCUIT

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE,
TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE
PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK,
et al.,

Intervenors.

Rehearing En Banc Pursuant to Order of February 15, 1977

BRIEF FOR PETITIONERS TOWN OF DURHAM
AND ASSOCIATION FOR THE PRESERVATION OF
DURHAM VALLEY



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, TOWN OF
GREENVILLE, TOWN OF DURHAM, NEW YORK
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BRIEF FOR PETITIONERS TOWN OF
DURHAM AND ASSOCIATION FOR THE
PRESERVATION OF DURHAM VALLEY

Preliminary Statement

This additional brief is submitted on behalf of Petitioners the Town of Durham, New York ("Town of Durham") and the Association for the Preservation of Durham Valley (the "Association") (collectively, the "Durham Petitioners") in compliance with the Order of this Court dated February 15,

1977, granting rehearing en banc limited to the question whether Respondent Federal Power Commission (the "Commission") "is authorized to reimburse the intervenors [Durham Petitioners] for counsel fees and expenses" incurred in connection with their participation in this seven-year contested proceeding.

A majority of a panel* of this Court held, in a decision filed on December 8, 1976 (the "Majority Decision"), that the Commission had authority to reimburse the Durham Petitioners for their counsel fees and expenses, and remanded to the Commission for further consideration the Durham Petitioners' requests for reasonable reimbursement of their litigation expenses. (Greene County Planning Board v. F.P.C., Docket Nos. 76-4151 and 76-4153 (2d Cir., Dec. 8, 1976), Slip Op. at 829 [hereinafter cited as "Slip Op."]). The Commission, on January 5, 1977, petitioned for rehearing and suggested that the matter be reheard en banc. The Durham Petitioners did not suggest en banc review.

For the reasons set forth herein, the Court, en banc, should not disturb the majority's ruling on the fees and expenses issue. The decision is sound in its analysis and result. No modification is needed.

* The panel consisted of Circuit Judges Lumbard and Van Graafeiland and District Judge Bonsal, sitting by designation. Judge Van Graafeiland dissented from the majority's decision on the fees and expenses issue.

Issue Presented On This En Banc Review

The sole issue presented for review by this Court, en banc, pursuant to the February 15, 1977 Order, is:

Whether the Commission has authority to reimburse the Durham Petitioners -- impoverished intervenors in an extended Commission transmission line proceeding -- for their reasonable counsel fees and expenses incurred in connection with that proceeding.

Prior Proceedings in This Court

Two prior reported decisions of this Court, in which the Durham Petitioners were parties, review many of the background facts. These opinions are: Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972) ("Greene County I"), and Greene County Planning Board v. F.P.C., 490 F.2d 256 (2d Cir. 1973) ("Greene County II"). In addition, the Majority Decision summarizes and reviews the lengthy history of the extended proceedings giving rise to this rehearing en banc. (Slip Op. at 816-821).*

* The Durham Petitioners' main and reply briefs filed in Docket No. 76-4153 on the fees and expenses issue are dated September 27, 1976 and October 22, 1976. We respectfully refer the Court to these prior submissions.

Statement of the Case*

Proceedings Prior to Greene County I

In June 1969, the Commission granted a license to the Power Authority of the State of New York ("PASNY") to construct and operate a pumped storage power facility in Schoharie County, New York, including as part of the project works three 345 kilovolt, high towered transmission lines (R** 5648). While the license authorized construction of the project generally, it specifically prohibited construction of the transmission lines until the Commission had an opportunity to examine a number of issues, including the environmental impact which any such lines might have.

In November 1969, PASNY applied for authorization to construct the three transmission lines, one of which was to run from Gilboa, in Schoharie County, through

- * For the convenience of the en banc Court, we have summarized the salient facts.
- ** The prefix "R" denotes record citations. The pagination follows that set forth in the Certificate of Record in Lieu of Record. The prefix "Tr." denotes a reference to the hearing transcript which comprises the first 4,047 pages of the record. The prefix "Ex." denotes a reference to Exhibits received at the hearing. A deferred joint appendix was previously filed, pursuant to this Court's Civil Appeal Scheduling Order No. 5. The relevant opinions and orders of the Commission and the Initial Decision of the Administrative Law Judge were included therein. The prefix "A" are to pages of the deferred joint appendix.

the Town of Durham and the heart of the historic Durham Valley to a location near Leeds, in Greene County, New York (the "Gilboa-Leeds line") (R 7602). The proceedings (Project No. 2685) relating to such application and amendments thereto are hereinafter referred to as the "Proceeding."

The Durham Petitioners filed a petition for leave to intervene in the Proceeding to prevent the despoliation of Durham Valley (R 5723). In May 1970, the Commission granted the Durham Petitioners leave to intervene, recognizing that their contribution to the proceeding "may be in the public interest" (R 5737).

Greene County I

In December 1970, PASNY filed an amended application with the Commission for the routing of the Gilboa-Leeds line. It proposed a "Route A," which, like the route proposed in its November 1969 application, would pass through the Durham Valley area, and it also proposed an alternate, "Route B," which would pass through other areas in Greene County (R 5739). On January 13, 1971, the Commission promulgated notice of PASNY's amended application (R 5756).

On March 26, 1971, PASNY filed its Environmental Report with the Commission in purported compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321

et seq. (R 4269). The Durham Petitioners and the Greene County Planning Board subsequently submitted their Statement of Environmental Position, in which they opposed the construction, routing and design of the Gilboa-Leeds line along Route A and questioned whether there was need for the line. They argued that, contrary to PASNY's contentions, a transmission line over proposed Route A, and particularly through Durham Valley, would have a significant adverse impact on the environment of the area; would be destructive of the unique scenic beauty of the area; and would dramatically destroy its historic ambiance (R 6023).

Thereafter, the Commission sought to conduct hearings on the basis of the environmental report submitted by PASNY, and issued orders rejecting the contention of the Durham Petitioners and the Greene County Planning Board that the Commission had abdicated its responsibilities under NEPA by failing to prepare its own environmental impact statement. The Durham Petitioners and the Greene County Planning Board sought review of these orders in this Court.

In January, 1972, this Court, in Greene County I, found that the Commission had not complied with NEPA and remanded for further proceedings. Significantly, this Court summarized a number of the procedural difficulties which had confronted petitioners, including the need to seek judicial

relief under the Freedom of Information Act, and stated:

". . . we are constrained to note that the Commission at nearly every turn has made it difficult procedurally for the intervenors." 455 F.2d at 417, n.12.

In Greene County I, the Durham Petitioners also requested an order requiring the Commission, or in the alternative PASN, to pay their reasonable fees and expenses at the conclusion of the Proceeding.* The Commission, which initially denied the Durham Petitoners' request for reimbursement, took the position before this Court that the application was premature and it "left open the question of whether ultimately to award them [fees] when the proceedings have come to an end." (455 F.2d at 425) This Court held that:

"[W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASN to pay the expenses and fees of petitioners. . . ." 455 F.2d at 426 (emphasis added).

* In connection with the Proceeding, the Durham Petitioners, since 1971, have sought: (i) reimbursement for out-of-pocket expenses incurred on their behalf; (ii) reimbursement for experts' fees and expenses incurred on their behalf; and (iii) payment of a reasonable attorneys' fee to their counsel and reimbursement of out-of-pocket expenses and disbursements incurred by counsel (R 5840, 5930).

The Court also noted:

"Whether or not [Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)] could support such an award as petitioners seek without a more specific congressional mandate, we do not find compelling need for it at this point, in view of our direction as to the role required of the Commission here." 455 F.2d at 427 (emphasis added; footnote omitted).

Proceedings After Greene County I

The Commission unsuccessfully sought review in the Supreme Court of the United States of this Court's decision in Green County I (409 U.S. 849 (1972)). Thereafter, a draft Environmental Impact Statement ("EIS") was prepared and circulated (R 6253) and, subsequently, a final EIS was prepared by the Commission and made available in May 1973 (Ex. 71, R 4565).

Petitioners claimed that the draft EIS was deficient in material respects. Applications for corrective action on this point were made to the Administrative Law Judge and to the Commission, which were denied (R 6521, 6570, 6709, 6793, 6927, 6997). This Court in Greene County II, over the vigorous dissent of Judge Mansfield,*

* Judge Mansfield noted that (i) the Commission's "use of procedural cat-and-mouse games in an effort to avoid a final order amounts to a sham . . ."; (ii) "The twists and rebounds in the FPC's process have already taxed their [the Durham Petitioners'] financial resources [footnote omitted]"; and (iii) ". . . the FPC in its conduct of the hearing has violated both the letter and spirit of an existing Court mandate." 490 F.2d at 260-261.

denied Petitioners' motion for a stay of the agency proceedings until a comprehensive impact statement was prepared.*

The Subsequent Administrative Hearings and the Durham Petitioners' Participation Therein

Following this Court's decision in Greene County II, extensive Commission hearings on the questions of the need for the Gilboa-Leeds line and the route location of that line were held before Administrative Law Judge Levy.** During the hearings, PASNY preferred Route A, identifying it as the "optimum route." (Tr. 225). PASNY made modifications to this route, as well as to its alternate Route B, and they were designated Routes A-1 and B-1 (Ex. 55A, B, C, R 4474). The Commission's Staff also proposed modifications to the A-1 and B-1 routes. In its final Environmental Impact Statement, the Staff concluded that it preferred Route A-1, as modified by it (Ex. 71 (p. 179), R 4565 et seq.).

From the outset of this case in 1969, the Durham Petitioners have continuously maintained that a transmission

* Judges Mansfield, Oakes and Timbers dissented from the denial of Petitioners' petition for rehearing and suggestion that the action be reheard en banc (Order dated March 22, 1974).

** Hearings in this Proceeding were held during the period from June 22, 1971 to September 19, 1974. There were 24 hearing days in Washington, D.C. or Albany, New York. Counsel for the Durham Petitioners, with one exception due to illness, attended all sessions.

line through the Durham Valley (i.e. along Route A or A-1, with either the Commission Staff or PASNY modifications) would be an environmental and cultural disaster (R 6023, 4903). In the hearings before the Administrative Law Judge, the Durham Petitioners produced highly qualified expert witnesses from a broad spectrum of disciplines to conclusively demonstrate this fact. These experts were: David Lowenthal, Professor of Geography at University College in London and an eminent lecturer and writer on land use, geography, environmental management and landscape evaluation (Tr. 3028 et seq.); (ii) Narendra Juneja, Assistant Professor in the Department of Landscape Architecture and Regional Planning in the Graduate School of Fine Arts of the University of Pennsylvania, recognized by the Commission Staff as "one of the distinguished architects in this country" (Tr. 3636 et seq., Tr. 3763); (iii) John Hightower, former director of the Museum of Modern Art and former Executive Director of the New York State Council on the Arts (Tr. 3229 et seq.); (iv) Vernon Haskins, the Town Historian for the Town of Durham (Tr. 3346); (v) David Erdmann, a history teacher who prepared a study on the Susquehanna Turnpike, which runs through Durham Valley* (Tr. 3286 et seq.); and (vi) Brooks

* The Turnpike would have been bisected with a Route A transmission line. At the hearings, the Durham Petitioners (Footnote continued)

Atkinson, a noted conservationist and naturalist, who was also an Intervenor in the Commission's Proceeding (Tr. 3197 et seq.). The Durham Petitioners also assisted in the presentation of Intervenor Sierra Club expert witness Alan Gussow, a professional artist, lecturer and writer on conservation and the arts (Tr. 3399 et seq.). In addition, the Durham Petitioners prepared, assembled and introduced in evidence a multitude of documents, studies, photographs and slides -- all demonstrating the unique scenic, historical and cultural aspects of the Durham Valley (e.g., Exs. 98-111, 153A-K, 154, 155A-T, 156-161; R 5013-5125, 5360-5428).

Enormous amounts of time and money were expended by the Durham Petitioners in connection with their ultimately successful efforts to convince the decision makers of the soundness of their position. Substantially more than 1,000 hours of attorneys' time have been devoted to these efforts, and thousands of dollars of expenses have been incurred -- all without a penny of recompense.

The Durham Petitioners are impecunious. An affidavit of the Durham Petitioners' inability to finance their participation in this Proceeding, with its attendant

(Footnote continued)

tioners brought out the highly material fact that the Turnpike was nominated for and subsequently placed on the National Register of Historic Places (Exs. 81, 100, R 4939, 5045).

intermediate reviews in this Court, was filed with the Commission (R 5930). In the 1972 Town budget for the Town of Durham, a total of only \$800 was allocated for all legal services and expenses (R 6137, Aff't of Town Supervisor). There has been no material change since 1972.

In connection with the administrative hearings, the Durham Petitioners renewed their reimbursement request.

The Administrative Law Judge's Decision on Route Location and on Fees and Expenses

On July 1, 1974, Administrative Law Judge Levy rendered his Initial Decision (R 7033, A 1-63). He concluded that the proposed Gilboa-Leeds transmission line should not be built along Route A, either as modified by PANSY or the Staff, and recommended Route B-1 instead. In reaching this conclusion, Judge Levy unequivocally determined that:

"[T]he most scenic, aesthetic, historical, and cultural values in the impact area are found in the Durham Valley [traversed by Routes A and A-1] and along the Susquehanna Turnpike looking south to the northern rim of the Catskills." R 7033 et seq., A 16.

A transmission line erected along Route A would be, he found, damaging to these essential values.

Each of the experts produced at the hearings by the Durham Petitioners was of undoubted assistance to the

Administrative Law Judge in his determination and evaluation on the routing of the proposed line. Indeed, the Commission's Staff noted with approval the "contributions" and "new insights . . . as to the unitary character of Durham Valley . . ." which were provided by the Durham Petitioners' expert witnesses (Staff Reply Brief to the Administrative Law Judge, 4/24/74, pp. 13, 24). However, the Administrative Law Judge again rejected the Durham Petitioners' application for reimbursement of fees and expenses (R 7033, A 28).

The Commission's Opinion No. 751

The Commission affirmed and adopted the Initial Decision of the Administrative Law Judge "as the decision of the Commission." (R 7297, A 65) On route location the Commission agreed with Judge Levy's "choice" of Route B-1 and his conclusion that the "most scenic, aesthetic, historical, and cultural values in the impact are found in the Durham Valley and along the Susquehanna Turnpike" and, that "for environmental reasons" the Route preferred by the Commission Staff was not desirable (R 7297, A 76-78, 85).

The Commission rejected the Durham Petitioners' reimbursement application,* citing this Court's decision

* In its submission to the Commission, the Durham Petitioners requested an opportunity to supply detailed affidavits attesting to the reasonableness of the amounts sought (R 7107).

in Greene County I and the Supreme Court's ruling in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The Commission then ruled:

"Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice." R 7297, A 84-5.

An opinion and order of the Commission (Opinion No. 751-A) denying the Durham Petitioners' petition for rehearing of Opinion No. 751 (A 64) was issued on April 27, 1976 (R 7347, A 110). Accordingly, the Durham Petitioners sought review in this Court pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 8251(b)).

The December 8, 1976 Decision of this Court

On December 8, 1976, a majority of a panel of this Court issued its decision holding, inter alia, that the

Commission had authority to award counsel fees and expenses to the Durham Petitioners, and remanded the case to the Commission "for further consideration of [the Durham Petitioners'] requests for reasonable reimbursement of their litigation expenses." (Slip Op. at 829) The majority based its holding on certain recent decisions of the Comptroller General of the United States authorizing such reimbursement, noting that the Comptroller General is "Congress's agent for the purpose of determining the legality of administrative expenditures...." (Slip Op. at 827) Circuit Judge Lumbard, for the majority, added that:

"Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate. See 16 U.S.C. § 793 ('The commission may make such expenditures . . . as are necessary to execute its functions.'). On this basis the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses." Slip Op. at 827-828.

With respect to the Commission's specious argument that the Durham Petitioners had served no interests other than their own, the majority stated:

"[W]e have some doubts about the fairness of withholding funds from these particular petitioners. All intervenors in agency proceedings are engaged in protecting their perceived self-interests; otherwise they would not bother to intervene. Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of

unspoiled scenic countryside. They seem to have played an essential role in the proceedings: it was their evidence and advocacy that appears to have been responsible for persuading the Commission to reject the preference of its own staff and the PASNY for the slightly shorter route running through the Durham Valley. Thus, the Commission was substantially aided in making its determination by the action of the intervenors. Where environmental issues are involved, a salutary public interest is served if the parties affected have the opportunity to express their views. Otherwise, the Commission could be limited to the information made available to it by the power companies and business interests directly involved. Moreover, it seems quite possible that the Durham petitioners could qualify as 'indigent' in that their litigation obligations may be unreasonably large in comparison to their financial resources." Slip Op. at 828 (emphasis added).

Circuit Judge Van Graafeiland dissented.

The Commission sought rehearing en banc with respect to the majority's holding on the fees and expenses question. By Order dated February 15, 1977, a majority of this Court directed that the present limited review be had.

The narrow, but important, question in this en banc rehearing is whether the Commission "is authorized to reimburse the intervenors for counsel fees and expenses". The majority of the panel in a cogent opinion held the Commission has such authority. In the following portion of this additional brief, we will demonstrate to the en banc Court that the Majority Decision of December 8 was eminently correct and should not be modified.

ARGUMENT

I

THE COMPTROLLER GENERAL OF THE UNITED STATES
HAS EXPLICITLY RULED THAT THE COMMISSION
HAS THE AUTHORITY TO MAKE THE REQUESTED
REIMBURSEMENT OF COUNSEL FEES AND EXPENSES

On four separate occasions in the past year, the Comptroller General of the United States has addressed the question of the statutory authority of federal regulatory agencies to reimburse impecunious intervenors for counsel fees and expenses incurred in agency proceedings. In each case, the Comptroller General concluded that the federal agencies involved -- including the Commission -- had such authority under certain limited circumstances which the Majority Decision found to appear to be applicable to the Durham Petitioners. These four Comptroller General decisions are annexed hereto in chronological order as Addenda A-D.* Their underlying rationales and the standards for reimbursement developed therein are discussed in detail below.

The February 19, 1976 Nuclear
Regulatory Commission Decision

In Matter of Costs of Intervention - Nuclear

* The Durham Petitioners first became aware of the decisions set forth in Addenda C and D after this Court's December 8, 1976 decision.

Regulatory Commission, B-92288 (February 19, 1976), the Comptroller General, in response to an inquiry from the General Counsel of the Nuclear Regulatory Commission (the "NRC"), ruled that the NRC had the authority to pay the counsel fees, expert witness fees and related expenses of participants in nuclear licensing proceedings. A copy of this decision is annexed hereto as Addendum A.* The Comptroller General stated:

"We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings." Addendum A, at 7 (emphasis added).

In reaching this result, the Comptroller General convincingly disposed of the claim that reimbursement was precluded in the absence of any specific statutory authority affirmatively permitting it. He first noted that the NRC is authorized by statute to hold hearings with respect to licensing and other matters, and is further authorized to admit as

* As discussed below, the Comptroller General on May 10, 1976 issued a ruling (Addendum B) holding that the February 19, 1976 decision was "equally applicable" to the Federal Power Commission.

a party to such hearings any person whose interests may be affected thereby.* (Addendum A, at 3) The Comptroller General then observed that the NRC received lump sum appropriations for "salaries and expenses," which appropriations simply provide that the funds disbursed are to be used "For necessary expenses ... in carrying out the purposes" of the act of Congress creating the agency.** (Id.) In language that has become common to each of his four decisions in this area, the Comptroller General then set forth the underlying rationale of his ruling as follows:

- * The comparable statutory provision applicable to the Commission is 16 U.S.C. § 825g.
- ** The Commission, too, receives such lump sum appropriations from Congress for "salaries and expenses." Its appropriation for the present fiscal year is contained in Pub. L. No. 94-355 (90 Stat. 889) which provides:

"TITLE IV--INDEPENDENT AGENCIES

* * *

Federal Power Commission
Salaries and Expenses

For expenses necessary for the work of the Commission, as authorized by law . . .
\$41,582,000." 90 Stat. 889, at 898.

As noted in the Majority Decision (Slip Op. at 827), the Commission is authorized by 16 U.S.C. § 793 simply to make "such expenditures . . . as are necessary to execute its functions."

"While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973)." Addendum A, at 3 (emphasis added).

In the course of his NRC decision, the Comptroller General also held that neither the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), nor this Court's decision in Greene County I, nor the District of Columbia Circuit's decision in Turner v. Federal Communications Commission, 514 F.2d 1354 (D.C. Cir. 1975) "affect the [NRC's] authority to reimburse intervenors for expenses" (Addendum A, at 6). Both Alyeska and Greene County I have been relied upon heavily by the Commission in their attempt to deprive the Durham Petitioners of reimbursement.

The Comptroller General's NRC decision distinguishes between "fee shifting" between litigants, held generally impermissible in Alyeska absent any statutory or contractual provision permitting it, and "fee reimbursement" made to particular participants in the agency process accord-

ing to the agency's discretion. The decision specifically provided that there was "no question of compelling NRC to pay the expenses of any of the parties" (Addendum A, at 7 (emphasis in original)). Reimbursement, though statutorily permissible, was held to be proper only when the NRC determined that it was warranted under the limited standards set forth by the Comptroller General and quoted at page 18 supra.

The May 10, 1976 Decision

In a decision dated May 10, 1976 (B-180224), addressed to the Oversight and Investigations Subcommittee of the House of Representatives Committee on Interstate and Foreign Commerce, the Comptroller General discussed the applicability of the February 19 NRC decision to other federal regulatory agencies. A copy of the May 10 decision is annexed hereto as Addendum B. Significantly, the May 10 decision explicitly states that the Comptroller General's February 19 NRC decision is "equally applicable" to the Commission and eight other federal agencies. (Addendum B, at 2)

The Comptroller General reiterated that there was "no statutory prohibition against" the type of reimbursement sought here by the Durham Petitioners, and stated specifically that:

"1. Provision of funds directly to participants. With respect to your first question,

appropriated funds of each agency [FPC] may be used to finance the costs of participants in agency hearings whenever the agency finds that [1] it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation." Addendum B, at 2.

As in the February 19 NRC decision, the Comptroller General added that the question of whether a particular party satisfied the standards for reimbursement was a matter of agency discretion. (Id.)

The September 22, 1976 Black Caucus Decision and the December 3, 1976 Food and Drug Administration Decision

The Comptroller General reaffirmed the validity of his February 19 and May 10 determinations in a September 22, 1976 decision (B-139703) addressed to Congressman William Clay, in response to his inquiry, on behalf of the Congressional Black Caucus, concerning, among other matters, the Federal Communications Commission's authority to reimburse indigent intervenors for attorneys fees and related expenses, and again in a December 3, 1976 decision issued in response to a similar inquiry by the Food and Drug Administration. (Matter of Costs of Intervention - Food and Drug Administration, B-139703 (Dec. 3, 1976)). Copies of the September 22

decision and the December 3 decision are annexed hereto as Addenda C and D, respectively.

Both the September 22 decision and the December 3 decision rely upon and adopt the rationale set forth in the seminal February 19 NRC decision, discussed above, with respect to the question of the statutory authority of regulatory agencies to make the payments in question. However, in the December 3 FDA decision the Comptroller General elaborated upon the standards to be applied in awarding reimbursement:

"While our decision to NRC did refer to participation being 'essential,' we did not intend to imply that participation must be absolutely indispensable. We would agree . . . that it would be sufficient if an agency determines that a particular expenditure for participation 'can reasonably be expected to contribute substantially to a full and fair determination of' the issues before it, even though the expenditure may not be 'essential' in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent." Addendum D, at 5.

Most significantly, with respect to the absence of express Congressional approval of reimbursement of indigent participants in the regulatory process, the Comptroller General stated:

"Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the

[congressional] appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval."
Id., at 8 (emphasis added).

The Majority Decision's interpretation of and reliance upon the critical February 19 and May 10, 1976 rulings of the Comptroller General requires no change. The two more recent Comptroller decisions, supportive of and consistent with the earlier rulings, are icing on the cake.

II

ABSENT A SHOWING THAT THE COMPTROLLER GENERAL'S REIMBURSEMENT DECISIONS ARE CLEARLY ERRONEOUS, THEY BIND THE COMMISSION AND SHOULD NOT BE DISTURBED BY THIS COURT

The Comptroller General acted well within the traditional scope of his statutory authority in rendering the decisions, discussed in Point I, supra, that the Commission and other federal regulatory agencies may properly reimburse indigent parties for their costs of participating in regulatory proceedings. Indeed, as demonstrated below, Congress expressly intended that the Comptroller General perform what it termed the "judicial duty" of rendering decisions inter-

preting the agencies' statutory authority with respect to disbursements from the public fisc. As the Majority Decision properly held, such a decision is binding upon the executive agencies and the case law is clear that, absent a showing that such a decision is clearly erroneous, it should not be overturned by the courts.

The Legislative Underpinnings of the Comptroller General's Authority to Determine the Propriety of Public Expenditures

The Statutory Framework

The Comptroller General operates as the chief auditing and accounting officer of the United States. See 31 U.S.C. § 1 et seq. As the Majority Decision recognized (Slip Op. at 827), Congress outlined his responsibilities with respect to the regulatory agencies in 31 U.S.C. § 65, which provides:

"It is the policy of the Congress in enacting this chapter that --"

* * *

"(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which . . . financial transactions have been consummated in accordance with laws, regulations or other legal requirements . . ." (Emphasis added).

Congress further specifically provided, in 31 U.S.C. § 74, that:

"Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

(Emphasis added).

It is pursuant to this provision that the decisions discussed in Point I, supra, were apparently rendered.

Legislative History of Section 74

Section 74, which permits the Comptroller General to determine in advance the propriety of an expenditure of public funds, was enacted in 1894 as part of the Dockery Act (Act of July 31, 1894, 28 Stat. 205 et seq.).* The Dockery Act significantly reorganized the system of government auditing and accounting, then the responsibility of the Department of the Treasury,** and was the result of an intensive study of that system by a panel of accounting experts who reported and made recommendations to a Joint Commission

* Section 65(d) was adopted as part of the Budget and Accounting Procedures Act of 1950 (Act of Sept. 12, 1950, 64 Stat. 832 et seq.), which included, as a component thereof, "a complete Accounting and Auditing Act of 1950." (H.R. Rep. No. 2556, 81st Cong., 2d Sess. (1950), 1950 U.S. Code Cong. & Admin. News 3707, at 3714)

** The Treasury Department was relieved of responsibility for government auditing and accounting by the Budget and Accounting Act of 1921 (Act of June 10, 1921; 42 Stat. 20 et seq.), which created the present-day General Accounting Office (the "GAO") and specified that the

(footnote continued)

of Congress to Inquire into the Status of Laws Organizing the Executive Departments (the "Joint Commission"). The report of the Joint Commission, which included as an appendix the report of the panel of accounting experts, is set out at 26 Cong. Rec. 7483 et seq. (The two reports are hereinafter cited as "Joint Commission Report" and "Report of the Experts".*)

The reports of the Joint Commission and the panel of experts reveal that the government accounting system as it existed in 1894 was the result of a series of "patchwork" additions, both "incongruous and complicated," to a system originally established in 1789, when Congress created, among other things, the offices of Comptroller and Auditor within

(Footnote continued)

GAO would be "independent of the executive departments and under the control and direction of the Comptroller General of the United States." Id., § 301, 42 Stat. 23, 31 U.S.C. § 41) "All the powers and duties" previously conferred upon the Comptroller of the Treasury (the Comptroller General's predecessor) were transferred to the GAO. Id. § 304, 42 Stat. 24, 31 U.S.C. § 44). In addition, the new Comptroller General was given broad responsibility to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds. . . ." and was further directed to "specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law." (Id. § 312, 42 Stat. 25, 31 U.S.C. § 53 (a), (c))

** The official title and citation of the Report of the Experts is: Report No. 5 of the Office of the Experts Under the Commission to Examine the Executive Departments, 26 Cong. Rec. 7485 (1894).

the Treasury Department. (Report of the Experts, 26 Cong. Rec. at 7485) These two officers handled the auditing and accounting for the entire United States government -- a system "well enough adapted to the transaction of the comparatively small business of the Government as then conducted." (Joint Commission Report, 26 Cong. Rec. at 7483) However, by 1894, the tremendous growth of the government had led to the creation of an additional Comptroller, five more Auditors (each with responsibility for a different department, or departments, of the government) and a huge force of clerks. (Report of the Experts, 26 Cong. Rec. at 7485) Government accounting had become a morass of "confusion, delay, and vexation...." (Id.)

The Joint Commission Report makes clear that a principal cause of the confusion and delay that existed in 1894 was the duplication of efforts by the Comptrollers and Auditors. To eliminate this problem, the Dickey Act sought to make the six Auditors solely responsible for the "mathematical computations" necessary to the auditing and settling of accounts, and to establish a single Comptroller of the Treasury (today the Comptroller General), who would be relieved from the responsibility of repeating the arithmetic of the Auditors and whose principal function would be to interpret statutory law to determine the propriety of the

payments made by disbursing officers throughout the government and approved (or disapproved) by the Auditors. Thus, the Joint Commission Report states:

"Above the six Auditors is placed one Comptroller, with his assistant, to revise the few settlements appealed from the Auditor, but mainly to determine finally the construction of statutes either by revision on the Auditor's report of decisions, or on appeal.

"The advantage of having one Comptroller to stand in the same relation to the Auditors as an appellate court to inferior courts . . . is so clear that it requires no argument. As it is now statutes sometimes receive contradictory constructions by the different Comptrollers. Under the system proposed there will be uniform construction of statutes. . . and the fact that one officer is charged with this judicial duty, and relieved from mere mathematical computations, will be likely to lead to more satisfactory results." Joint Commission Report, 26 Cong. Rec. at 7483-7484 (emphasis added).

As is clear from this passage, the Comptroller's "judicial duty" to construe statutes was not a new one, even in 1894.

Referring to the power of the Comptroller General, which was to be formally memorialized in statute, to render advance decisions, the Joint Commission report stated:

". . . disbursing officers or heads of the Executive Department may obtain the decision of the comptroller upon any question involving a payment to be made by them, which will bind the Auditors and the Comptroller in passing upon the account containing such disbursement. This is intended as a measure of relief for disbursing officers, and also to allow the Executive Departments to

know what the action of the Comptroller will be before an expense is incurred by them." 26 Cong. Rec. at 7484 (emphasis added).

Other than certain changes in nomenclature, the "advance decision" provision of the Dockery Act has remained unchanged from its passage in 1894 to this day. (See 31 U.S.C.A. § 74 (1976 ed.), at 99 ("Historical Note"))

Decisions of the Comptroller General Bind the Executive Branch and Should Not be Disturbed Unless Clearly Erroneous

The decisions of the Comptroller General pursuant to 31 U.S.C. § 74 have long been recognized to be final and binding upon the components of the Executive branch of the Government. For example, in a decision reported at 33 Op. Atty. Gen. 265 (1922), the Attorney General declined to answer an inquiry from the Secretary of the Navy concerning the authority of the Department of the Navy to pay the traveling expenses of officers' dependents to and from stations outside the continental United States. Instead, the Attorney General directed the Secretary of the Navy to submit his inquiry to the Comptroller General. Citing what is now 31 U.S.C. § 74, the Attorney General ruled:

"The above-quoted section [§ 74] places an obligation on the Comptroller of the Treasury (now the Comptroller General) to render a decision upon any question involving a payment to be made by or under the head of any Executive Department, and contemplates the construction by him of statutes. 21 Op. [Atty. Gen.] 178, 181 [1895].

"The Comptroller of the Treasury is charged with the duty of rendering decisions upon questions involving payments to be made by or under the direction of the head of an Executive Department, and his decision is final and conclusive as to all executive officers. 22 Op. [Atty. Gen.] 581 [1899]; 23 Op. [Atty. Gen.] 468 [1901]; 25 Op. [Atty. Gen.] 185 [1904]."
33 Op. Atty. Gen. at 267 (emphasis added).

In addition to the supporting citations contained in the Attorney General's decision quoted above, see also 33 Op. Atty. Gen. 268 (1922) and Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973) (noting that the GAO's "decisions respecting money claims are binding on the Executive branch of the Government. . . .")

The authority of the Comptroller General to determine the propriety of expenditures by the Executive branch of the Government, and the standards to be applied by the courts in reviewing such determinations, were established years ago in Brunswick v. Elliott, 103 F.2d 746 (D.C. Cir. 1939). That case involved the authority of the Secretary of State, acting upon the advice of the Comptroller General, to refuse to pay a retirement annuity to a retired Foreign Service officer who had subsequently obtained other gainful government employment. The retired Foreign Service officer sought injunctive relief ordering, among other things, that the Secretary of State pay him his annuity and that the Comptroller General be enjoined from interfering with or preventing such payment.

The district court denied the injunctive relief requested and dismissed the complaint, and the Court of Appeals affirmed. While the Court of Appeals noted that "the question is not free from reasonable doubt" (103 F.2d at 750), it nonetheless held:

"There can be no doubt that the matter came within the jurisdiction of the Comptroller General. The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 31 U.S.C.A. § 1 et. seq., provides that . . . the Comptroller General shall, upon request of a proper officer, render a decision such as that which is involved in the present case.

"When the fact of appellant's double compensation came to [the Comptroller General's] attention, therefore, it became his duty to inquire into the matter and answer the question thus presented. Unless the answer to this question was so free from doubt as to require no exercise of judgment or discretion, his duty in the premises was not merely ministerial and an injunction to restrain him from acting as he has done would be improper." Id. at 748-749 (footnotes omitted; emphasis added).

See also Doehler Metal Furniture Co., Inc. v. Warren, 129 F.2d 43 (D.C. Cir. 1942); United States ex rel. L. Margulies & Sons, Inc. v. McCarl, 10 F.2d 1012 (D.C. Cir.), cert. denied, 273 U.S. 696 (1926); United States ex rel. Carroll Electric Co. v. McCarl, 8 F.2d 910 (D.C. Cir. 1925). Significantly, the Brunswick court stated that the Comptroller General's decision necessarily "was required to be based upon an interpretation of statutes" (Id. at 750 (emphasis added))*

* The weight to be given a decision of the Comptroller General in a case such as the present one is further demonstrated by the remarks of Circuit Judge Gibbons (Footnote continued)

In the present case, the Comptroller General's determination that the Commission may properly expend public funds to pay an indigent intervenor's expenses in a Commission proceeding was not a mere "ministerial" determination, but a matter expressly addressed by Congress, pursuant to 31 U.S.C. §§ 65(d) and 74, to the sound discretion of the Comptroller General in his capacity as the chief accounting and auditing officer of the United States. As the Majority Decision recognized, this determination is "not clearly incorrect." (Slip Op. at 827-828.) Accordingly, it binds the Commission with respect to the lawfulness of such an expenditure, and binds the General Accounting Office, in the course of its audit of the Commission's expenditures, to approve such a payment.

Put in its simplest terms, the Comptroller General's May 10, 1976 opinion makes it clear that the Commission could pay the reasonable litigation expenses of the Durham Petitioners without fear that the Comptroller General or the General Accounting Office would, in the course of an audit, declare such an expenditure improper. Under the cir-

(Footnote continued)

in Citizens for a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018, 1022 n.3 (3d Cir. 1974) (dictum) and by the observations in Note, Federal Agency Assistance to Impecunious Intervenors, 88 Harv. L. Rev. 1815, 1827-1828 (1975). See also Comment, Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings, 6 ELR 10052 (1976).

circumstances, the Commission's claim that it nonetheless lacks the "authority" to make such a payment is wholly disingenuous.

III

THE ARGUMENTS ADVANCED BY THE COMMISSION FOR REVERSING THE MAJORITY DECISION ARE WITHOUT MERIT

In its petition for rehearing ("Comm. Pet.") dated January 5, 1977 in this matter, the Commission advances several arguments why the December 8 Majority Decision in this matter should be reversed. Each is wholly without merit.

The Majority Decision Does Not Sanction Unauthorized Fee Shifting

The Commission appears to recognize (Comm. Pet. at 8) the validity of the distinction drawn by the Comptroller General and adopted by the panel majority between "fee shifting" between actual litigants -- proscribed, "absent statute or enforceable contract," by Alyeska Pipe-line Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975) (emphasis added) -- and reimbursement by the Commission. However, the Commission argues that reimbursement by it would, in reality, constitute impermissible Alyeska-type fee shifting since, pursuant to Section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), the Commission spreads its administrative costs of hydro-electric licensing amongst all its licensees.

The Commission's argument, advanced now for the first time, proves too much. Initially, the Durham Petitioners vigorously dispute that the passing on, to all licensees, of the Commission's administrative costs of licensing can properly be considered "fee shifting" -- even if one of the administrative costs was the cost associated with insuring full public participation in Commission proceedings by reimbursing the expenses of certain indigent participants therein. The Commission can point to no evidence to suggest that the incremental cost to each of its many licensees from compliance with the Comptroller General's rulings would be anything but de minimis. It certainly is not in the nature of ordering fee shifting between private litigants, which was at issue in Alyeska.*

But even assuming, arguendo, that such passing-on of costs is viewed as a form of quasi-fee shifting, it is expressly sanctioned -- indeed, mandated -- by statute. Thus, it would not fall within the ambit of proscribed fee shifting under Alyeska.** Moreover, under Section 6 of the

* The Commission conveniently overlooks the \$41 million appropriated to it by Congress. See footnote at p. 19 supra.

** As the Commission itself concedes (Comm. Pet. at 8), Alyeska simply affirmed "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys fees." 412 U.S. at 257 (emphasis added).

Federal Power Act, 16 U.S.C. § 799, every license issued by the Commission must expressly set forth all the terms and conditions upon which it is issued, including the condition of 16 U.S.C. §803(e) that the licensee pay a share of the Commission's administrative costs. Section 6 further provides that the issuance of every license is conditioned upon the licensee's agreement to accept the terms and conditions set forth in the license. Thus, the license is in the nature of a contract between the Commission and the licensee, pursuant to which the licensee expressly and knowingly agrees to share in the administrative costs of the Commission. For this additional reason, again assuming that passing on administrative costs, including indigent reimbursement expenses, constituted fee shifting, the Alyeska decision nonetheless fails to support the position taken by the Commission.

The Majority Decision is Not
in Conflict with Green County I

The Commission has urged (Comm. Pet. at 11) that the Majority Decision has "construed the Comptroller General's opinion as overruling this Court's prior holding in Greene County I." In support of this erroneous proposition, the Commission quotes -- wholly out of context -- the following language from Greene County I:

". . . we perceive no basis in the terms of the provision to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress has not hesitated in other circumstances explicitly to provide for them. . . ." 455 F.2d at 426.

The above-quoted language was written by the Court in Greene County I in response to the petitioners' argument therein that an award of fees and expenses was permitted pursuant to Sections 309 and 314(c) of the Federal Power Act, 16 U.S.C. §§ 825h and 825m(c). The "far clearer congressional mandate" that the Court sought was a mandate "far clearer" than that provided by § 309, which simply authorizes the Commission to do what is "necessary and appropriate to carry out the provisions of [the Federal Power Act]." Such a mandate has since been given, as the Majority Decision plainly perceived, in the form of the recent opinions of the Comptroller General, "Congress's agent for determining the legality of administrative expenditures." (Slip Op. at 826-827)* As the panel concluded:

* As demonstrated in Point I, supra, the Comptroller General's NRC Decision, expressly made applicable to the Commission, was grounded upon the agency hearings provision of the Atomic Energy Act (42 U.S.C. § 2239(a)), and the appropriations act applicable to the NRC for 1976 (Pub. L. No. 94-180, 89 Stat. 1035). The comparable provisions applicable to the Commission are Section 308 of the Federal Power Act, 16 U.S.C. § 825g and, with respect to the present fiscal year's appropriation, Pub. L. No. 94-355, 90 Stat. 889, at 898.

". . . the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses." Slip. Op. at 827-828 (emphasis added).

See also Note, Federal Agency Assistance to Impecunious Intervenors, 88 Harv. L. Rev. 1818, at 1828-1829 (1975).

Greene County I clearly contemplated that subsequent developments might make the reimbursement of the Durham Petitioners appropriate. The Court's true holding on the fees and expenses issue was expressed thus:

"[W]e find ourselves in agreement with the Commission's position that at this posture and under current circumstances, without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners" 425 F.2d at 426 (emphasis added).

The Court also noted:

"Whether or not Mills [Mills v. Electric Auto-Lite Co., 396 U.S. 375] could support such an award as petitioners seek without a more specific congressional mandate, we do not find compelling need for it at this point, in view of our direction as to the role required of the Commission here." 455 F.2d at 427 (emphasis added).

The circumstances under which Greene County I was decided have changed dramatically. In addition to contributing, in Green County I, to forcing the Commission, against its will, to comply with NEPA, the Durham Petitioners, without question, played an essential role in the

outcome of the Proceeding. As the Majority Decision expressly noted:

"Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of unspoiled scenic countryside. They seem to have played an essential role in the proceedings: it was their evidence and advocacy that appears to have been responsible for persuading the Commission to reject the preference of its own staff and the PASNY for the slightly shorter route running through the Durham Valley. Thus, the Commission was substantially aided in making its determination by the action of the intervenors." Slip Op. at 828.

Under the circumstances as they now exist, the reimbursement by the Commission of the Durham Petitioners' fees and expenses is expressly authorized, consistent with Greene County I and well deserved.

The Majority Decision Does Not
Improperly Supersede the Judgment
or Authority of the Commission

The Commission suggests that the Majority Decision improperly "superseded the judgment of this Commission" and failed to accord proper deference to the Commission's interpretation of the Federal Power Act. (Comm. Pet. at 10) The Commission complains that the majority never found its position to be "unreasonable," but instead found the Comptroller General's decision to be "not clearly incorrect". (Comm. Pet. at 11) Finally, the Commission suggests that

it "has never applied for a decision by the Comptroller on this question" (Comm. Pet. at 12)* and that the Majority Decision displaced its discretion "in a matter of policy" (Comm. Pet. at 13).**

The Commission's contentions are spurious. As the Majority Decision recognized, the Commission's judgment as to expenditures of public funds is not entitled to deference when it conflicts with the judgment of the Comptroller General. With respect to "the legality of administrative expenditures," the majority stated, "[t]he Comptroller General's decision is authoritative." (Slip Op. at 827) Thus, the majority applied the proper test in ruling that:

* It is tempting to comment upon the Commission's ostrich-like contention that it should be relieved of the duty to recognize the Comptroller General's reimbursement decisions because it did not seek his opinion on this matter. However, the Durham Petitioners believe that this "argument" itself contains the elements of its refutation, and deserves no response.

** The Commission has also suggested (Comm. Pet at 13-14) that it should be excused from recognizing the authoritative effect of the Comptroller General's decisions on the application of the Durham Petitioners for reimbursement in this case because the NRC has decided that it will not initiate a reimbursement program for participants in its proceedings. This argument is a logical nullity. The NRC's inaction can in no way insulate the Commission from complying with its obligations to the Durham Petitioners. It is worth noting, however, that the Commission felt constrained to acknowledge that, "The NRC accepted the Comptroller General's statement of its legal authority" to make reimbursement. (Comm. Pet. at 13)

"... the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses." Slip Op. at 827-828.

This holding is consistent with the long-standing rule, discussed in Point II, supra, that the Comptroller General's determinations with respect to the propriety of agency expenditures are "final and conclusive as to all executive officers." (33 Op. Atty. Gen. 265, at 267) For the Commission to deny this, as it effectively does, is presumptuous in the extreme.

However, the Commission's discretion as to matters of policy properly within its purview has not been "displaced." As the Comptroller General himself took pains to make clear in each of his decisions on this matter, it is still necessary, before reimbursement may be made, ~~for~~ the Commission to determine that participation in its proceedings by the applicant for reimbursement is "necessary in order for it to properly carry out its functions" (Addendum B, at 2) In short, it is the Comptroller General who must determine whether payments are authorized, and the Commission who decides whether payments are merited. Both, of course, must exercise their authority in a manner that is not clearly inconsistent with law and that does not constitute an abuse of discretion.

CONCLUSION

For the foregoing reasons, the December 8, 1976
Majority Decision should not be disturbed.

Dated: New York, New York
March 8, 1977

Respectfully submitted,

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Douglas M. Kraus
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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

A
FEB 19 1976

FILE:

B-92288

DATE:

MATTER OF:

Costs of intervention--Nuclear Regulatory
Commission

DIGEST:

"American rule" explained in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) and other court cases provides that in absence of authorizing statute, neither court nor regulatory commission may shift litigation costs such as attorneys' fees among litigants. However, this rule is inapplicable to situation considered in B-139703, July 24, 1972, and current situation which involve availability of regulatory commission's appropriations to provide financial assistance to those who cannot afford to participate in commission's proceedings but whose participation is determined by commission to be necessary to full and fair proceedings.

The General Counsel of the Nuclear Regulatory Commission (NRC) has requested our decision on the following matter:

"The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have received several petitions from intervenor groups seeking financial assistance to pay the fees of attorneys and technical experts, and for related expenses of participants in nuclear licensing and rulemaking proceedings. The AEC recognized that those petitions raised a question of its statutory authority and, beyond that, broad and complex policy issues. The purpose of this letter is to request your advice whether the Nuclear Regulatory Commission possesses the legal authority to provide financial assistance to participants in its adjudicatory and/or rulemaking proceedings and, if so, under what limitations."

He advises that the Atomic Energy Commission, the NRC's predecessor agency, in its November 20, 1974 Consumers Power Company

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decision (Dkt. No. 50-155) expressed itself on the issue of its authority to provide financial assistance as "tentatively inclined to the conclusion that such authority exists." 4

The General Counsel has provided us with a number of representative letters of opinion from both proponents and opponents of a tentative proposal to fund indigent intervenors, published by NRC in the Federal Register on August 25, 1975 (40 Fed. Reg. 37056-7). We take no position as to the desirability of funding intervenors as a matter of NRC policy. Insofar as the letters of opinion challenged NRC's legal authority to use its appropriated funds for this purpose, we have summarized the principal arguments made and have presented our views in the form of a rebuttal to each argument.

(1) The NRC may not use appropriated funds to assist intervenors in the absence of specific statutory authority therefor.

The NRC was established as an independent regulatory agency under the provisions of the Energy Reorganization Act of 1974 (88 Stat. 1242; 42 U.S.C. § 5341) and Exec. Order No. 11,334, effective January 19, 1975. The licensing and related regulatory functions formerly assigned to the Atomic Energy Commission, pursuant to the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, were transferred to the NRC. Although there are a variety of NRC proceedings - *e.g.*, NRC rulemaking, construction permit, and operating license hearings - for which intervention may be sought, according to a report commissioned by the NRC on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings" ("Report"), Roasberg, Howe, Klorer & Mass, July 18, 1975, "the licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant, and intervenor time and resources." Accordingly, we examined the legislative authority for construction permit and operating license hearings particularly. 42 U.S.C. § 2239(a) (1970) provides:

"In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any

proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. * * *"
(Emphasis supplied.)

Clearly, NRC has ample authority to conduct a hearing and to admit as a party any one whose interests may be affected by the results of the hearing.

NRC generally receives lump-sum appropriations for salaries and expenses. For example, the most recent appropriation act, the "Public Works for Water and Power Development and Energy Research Appropriation Act, 1976," Pub. L. No. 94-180, December 26, 1975, simply provides:

"For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 * * *."

While 31 U.S.C. § 628 (1970) prohibits "agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Com. 621 (1927); 17 id., 636 (1933); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. As the court pointed out in Siegel v. Atomic Energy Commission, 400 F.2d 773, 783 (1968), Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. This is essentially the same rationale we followed in our decision B-139703, July 24, 1972, in which we held that the Federal Trade Commission (FTC) had authority to pay certain expenses incurred by indigent respondents and intervenors appearing before the Commission in adjudicative proceedings.

(2) The Comptroller General's decision to the Federal Trade Commission, on which the NRC relied in reaching its "tentative conclusion" in its Consumers Power decision, has been overruled by enactment of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act."

The "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," Pub. L. No. 93-637, 88 Stat. 2183, was enacted on January 4, 1975. Section 202(a) of that Act added a new subsection 18(h) to the Federal Trade Commission Act which provides:

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed \$1,000,000."

This provision was added to the Act by the House-Senate conference committee and there is no pertinent legislative history. However, we believe it is likely that since the new statute substantially formalized FTC's rulemaking procedures, the conferees wished to formalize the compensation allowable for intervenors as well, in order to enable them to participate more freely in the proceedings. The new provision broadened the class of persons and expenses eligible for financial assistance and placed overall restrictions on the use of FTC's appropriations. We do not feel that enactment of this provision was intended to overrule or modify the basis of our 1972 decision so as to reflect on its precedent value in dealing with agencies for which Congress has not enacted a similar statutory provision.

(3) The Congress affirmatively declined to authorize the NRC to pay the expenses of intervenors by deleting a Senate amendment to the Energy Reorganization Act of 1974 which would have provided such authority.

During consideration of the bill which was eventually enacted into the Energy Reorganization Act of 1974, Pub. L. No. 93-433, 88 Stat. 1233, an amendment was introduced by Senator Kennedy which would have specifically provided NRC for a period of 3 years with authority to pay expenses of intervenors. 120 Cong. Rec. S15050-15054 (daily ed., August 15, 1974). The amendment was adopted by the Senate but later deleted by the conference committee. In taking that action, the conference committee states in its report:

"Title V (section 501) provided that the Commission should reimburse parties in Commission proceedings for reasonable attorneys' fees. The Commission was to set a maximum amount allowed for each proceeding. The amounts paid were to be based upon the extent to which the party contributed to the development of facts, issues, and arguments relevant to the proceeding, and upon the party's ability to pay his own expenses.

"The conferees agreed to delete this section. The deletion of title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs

incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary." (Emphasis added.)

H. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974). We do not agree that the deletion of the Senate amendment indicated congressional intent to deny the NRC authority to reimburse intervenors. On the contrary, it appears that the members of the conference committee felt that although they wished to await NRC's final position on the matter, quite possibly specific legislation would not be necessary to authorize such financial assistance since they believe that the Atomic Energy Act as amended already contains the necessary authority.

(4) Recent cases have made it clear that there can be no authority to reimburse participants in the absence of a specific statutory provision.

The three cases cited most frequently by opponents to reimbursement authority are Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 514 F.2d 1354 (D.C. Cir. 1975); and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). The NRC General Counsel also asks specifically whether these cases affect the Commission's authority to reimburse intervenors for expenses. We do not believe they do.

In Alyeska, environmental groups had sued to stop construction of the trans-Alaska pipeline on the grounds, *inter alia*, that the Secretary of the Interior was violating the National Environmental Policy Act. The court below had ordered attorneys' fees taxed against Alyeska on the theory that the Society had acted as a private attorney general, vindicating important rights of all citizens and ensuring that the governmental system functioned properly. The Supreme Court reversed, noting that Congress had specifically permitted shifting of attorneys' fees despite the contrary "American rule" in a variety of circumstances, and holding that such specific statutory authorization was a requisite to

recovery. The Court further defined the "American rule" as precluding the prevailing litigant from ordinarily being entitled to collect a reasonable attorney's fee from the loser.

In Turner, intervenors appealed from an order of the FCC denying their request that the licensee which sought a renewal of its license be ordered to reimburse their legal expenses. The court said, "Congress has no more extended a 'roving commission' to the FCC than it has to the Judiciary 'to allow counsel fees as costs or otherwise whenever the . . . Commission might deem them warranted'." The court then concluded that, before an agency may order a litigant to bear his adversary's expenses, it must be granted clear statutory power by Congress.

In Greene County, the petitioner/intervenor was successful in compelling the agency to take a broader view of its National Environmental Policy Act (NEPA) responsibilities. Nonetheless, on the question of awarding intervenor financing, the court held that "we find ourselves in agreement with the Commission's position that . . . without a clear congressional mandate we should not order the Commission or PANY Power Authority of the State of New York to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." (Emphasis added.) In both the Alyeska and Turner cases, plaintiffs, the prevailing parties, sought to force their adversaries to pay their costs, including reasonable attorneys' fees. All the court did, in our view, is to uphold the "American rule," that in the absence of a statutory provision to the contrary, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In the Greene County case, the court said it had no power to order either the opposing litigants or the agency to pay the costs of the intervenors.

In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings.

Notwithstanding the above, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act, supra. We note that the Joint Committee on Atomic Energy is currently considering S. 1665, 94th Congress, which would accomplish the same objectives as the Kennedy amendment discussed, supra. In addition S. 2715, 94th Congress, which would provide general authority for payment of expenses of intervenors in proceedings subject to the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970) as well as in specified types of litigation is now before the Senate Committees on Government Operations and Judiciary.

The NRC has asked that, in addition to deciding the question of its authority to pay costs of intervention directly to participants, this Office advise it as to the legality of expenditure of appropriated funds on certain other forms of assistance to intervenors suggested in chapter VI, "Alternatives to Direct Intervenor Financial Assistance" of a report on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared for the Commission by the law firm of Doasberg, Newes, Klores and Kass ("Report").

The discussion of alternatives to direct financial assistance to intervenors in the report is wide ranging and includes numerous suggestions, described in varying degrees of detail. Since it is our understanding that the Commission is not actively engaged in implementing any of these alternatives at this time we will not attempt to discuss each one. We will limit our comments to the following observations on the suggestions we consider to be of greatest significance in the context of availability of NRC funds for expenditure.

Procedural Cost Reductions. Section 201(f) of Pub. L. No. 93-433, supra, transferred to NRC all of the licensing and related regulatory functions formerly performed by the Atomic Energy Commission (AEC). With respect to licensing authority, chapter 10 of the Atomic Energy Act of 1954, 68 Stat. 919, 936, approved August 30, 1954, 42 U.S.C. §§ 2131 et seq. (1970) provided that licenses should be issued by the AEC in accordance with chapter 16 of that Act, now codified at 42 U.S.C. §§ 2231 et seq. Under the authority provided by 42 U.S.C. § 2133 NRC is empowered to issue commercial licenses for nuclear utilization and production facilities "subject to such conditions as

the Commission may by rule or regulation establish to effectuate the purposes of this chapter." We believe this authority provides NRC with general powers to issue, modify and change its procedural regulations as it chooses to accomplish the functions it is required to perform with respect to issuance of commercial licenses. Certainly, nothing prevents the Commission from simplifying procedures and eliminating unnecessary or unduly burdensome requirements which increase the cost to parties of participating in licensing proceedings. This suggestion, thus, poses no legal problems.

Access to Technical Information and Staff. As part of the suggested procedural cost reductions, the "Report" proposes that NRC provide public participants, including intervenors, with what is described as "in house technical expertise," by granting participants access to technical information and staff, page 135, "Report." As to this suggestion we note that the conferees on the legislation which became Pub. L. No. 93-438, supra, deleted two sections of the Senate bill, S. 2744, 93d Congress, as passed by the Senate. Section 206 would have provided parties in NRC proceedings with technical assistance and made available studies and reports prepared or to be prepared by or for the Commission, the Energy Research and Development Administration or any other Federal agency, subject to existing laws concerning disclosure. NRC was to fund this assistance and then seek reimbursement unless the party was unable to provide it. Section 209 would have amended the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., to provide the public generally with information concerning safety factors. These sections were adopted by the Senate in floor debate, Cong. Rec., daily edition, August 15, 1974, pp. S15034-15047. The conferees did not explain the deletion of these provisions. See House of Representatives Conference Report 93-1445, supra, p. 37.

NRC must clearly provide such information as provided for by the FOIA. It may provide for easier access to such information. Currently, for example, NRC requires that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the NRC staff or other parties.

On the other hand, it does not appear that NRC has authority to allow access to its staff to provide a participant's technical expertise. The staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings.

Provision of Public Counsel. Under the broad mandate to NRC to issue commercial licenses for the utilization and production of atomic materials "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter" (chapter 10 of the Act of August 30, 1954, as amended, supra, 42 U.S.C. § 2133(a) (1970)), it would appear that the Commission has considerable regulatory flexibility. Thus, as discussed above, if the Commission should find it necessary to the commercial licensing process to establish some form of assistance to participants, including intervenors, who otherwise could not afford to participate, it may do so.

Certainly, however, no authority exists for NRC to supply funds for an independent Public Counsel outside of the regulatory agency as described in pages 135-138 of the "Report." The "Report" states that at present there is nothing at the Federal level which could be called an independent Office of Public Counsel. We agree with the suggestion on page 133 that the Commission could recommend enactment of legislation to establish special, publicly funded counsel for assistance to participants and intervenors if this appears to be desirable. Proposals for a Consumer Protection Agency are currently being considered by the Congress.

Independent Intervenor Assistance Centers. The comment made above with respect to provision of public counsel is applicable to this suggestion also. Although we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in NRC's proceedings.

R.P. KELLER

Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-180224

MAY 10 1976

The Honorable John E. Moss, Chairman
Oversight and Investigations Subcommittee
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

"(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B-92238, February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NRC rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to

each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors, although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. Provision of funds directly to participants. With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," supra.

2. Modification of procedural rules so as to ease their financial burdens on public participants. For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. Provision of technical assistance by agency staff. For the same reasons given under "Access to Technical Information and Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. Provision of legal assistance by agency staff. To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. Creation of an independent public counsel. We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an independent entity outside its jurisdiction and control.

6. Creation of a Consumer Assistance Office such as that now employed by the FCC. On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance office. According to a press release from FCC:

"This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance."

* * * *

"The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate

response to inquiries and to enhance public understanding of the Commission's policies and regulations.

* * * * *

"Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the full-time staff members of the Office.

"The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with them."

We have been informally advised by staff of the FCC that this office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

[R.F.] KELLER

Deputy Comptroller General
of the United States

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B-139703

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

General release 10-6-76

SEP 22 1976

W.A.

10-75-76

The Honorable William Clay
House of Representatives

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Dear Mr. Clay:

This is in response to a letter dated August 16, 1976, from you and six other members of the Congressional Black Caucus, asking five specific questions about the authority of the Federal Communications Commission (FCC) to reimburse expenses of persons who participate in proceedings before the Commission. The questions are as follows:

"1. Does the F.C.C. have the authority to make payments to persons who, as determined by the F.C.C., represent an interest the presentation of which contributes or can reasonably be expected to contribute substantially to a fair determination of an F.C.C. proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interest?

"2. Does the F.C.C. have the authority to make payments to persons who are not formally parties to F.C.C. proceedings but who nonetheless may submit written and/or oral comments and testimony pursuant to F.C.C. regulation, statute or court order?

"3. Does the F.C.C. have the authority to reimburse all the expenses reasonably necessary for a person to participate in an F.C.C. proceeding, including attorneys' fees, witness fees, related travel and preparation expenses (e.g., phone calls, copy costs, support staff costs) and the expenses incurred in taking depositions?

"4. May payments be based on the prevailing market rate in the private sector for similar services and expenses?

"5. Does the Commission have the authority to make disbursements prior to the commencement of and/or during a proceeding?

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As the letter indicates, our Office has confirmed in certain circumstances the authority of Federal regulatory agencies to reimburse the costs of persons who participate in proceedings before them. In a decision to the Chairman of the Federal Trade Commission dated July 24, 1972, B-139703, we held that the Commission could pay attorney transcript, witness, and attendance expenses incurred by indigent respondents or intervenors upon determination that such payments were necessary for the proper disposition of matters before it. Similarly, in B-92288, February 19, 1976, we sustained the authority of the Nuclear Regulatory Commission to pay costs of indigent intervenor groups before it. Finally, in a letter to the Chairman of the Oversight and Investigations Subcommittee, House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976, we observed with respect to a number of regulatory agencies, including the FCC, that--

"* * * appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that [1] it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. * * *"

The basic rationale underlying these decisions was stated as follows in B-92288, supra:

"* * * While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id. 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing

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determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. ***

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determinations unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. ***"

However, we also suggested that it would be advisable for the scope and limitations of such authority to be specified by statute, as has been done in the case of the Federal Trade Commission under section 18(h) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(h) (Supp. V, 1975). We note that legislation is now pending before the Congress which would expressly provide and delimit such authority with respect to Federal agencies generally. See H.R. 13901, 94th Cong. (May 19, 1976); S. 2715, 94th Cong. (May 13, 1976), as reported by the Senate Judiciary Committee, S. Rep. No. 94-263 (1976).

Applying the foregoing to the specific questions raised, we would advise, in response to the first question, that FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed *supra*, and is also supported by the legislative history of the act—Pub. L. No. 94-362 (July 14, 1976), 90 Stat. 937, 956—making appropriations to the Commission for fiscal year 1977. See Cong. Rec., June 18, 1976 (daily ed.), H6210 (colloquy between Representatives Burke and Slack).

As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are "necessary" to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory

B-139703

standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 (page 3, line 15-page 4, line 12), and S. 2715 (page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard.

The second, third, and fourth questions each involve matters which we consider to be within the Commission's discretion, subject to the conditions discussed above. As to the second question, prior to participation by a non-party the Commission must determine that participation by such non-party is necessary in order to enable the Commission to properly dispose of the matter before it, and that financial assistance is necessary in order to enable the non-party to participate. There may well be a situation in which the Commission would determine that participation by, and payments to, non-parties meet this test. Similarly with reference to questions three and four, the Commission would have the discretion to determine that payment—at such rates as FCC may determine reasonable under the circumstances—of any of the expenses listed are necessary for this purpose. Of course, the Commission may impose such limitations as it sees fit and in any event could not pay more than is reasonable and necessary in order to obtain the required participation.

With reference to the fifth question, 31 U.S.C. § 529 (1970) prohibits the making of advances of public money in any case unless authorized by the appropriation concerned or other law. Since we are not aware of any such authorization on the part of the Commission which would apply here, we must conclude that payments for the participation here involved must be made on a reimbursement basis. Thus the Commission could make disbursements only as participation is actually accomplished. Of course, such participation might be accomplished prior to the close of a Commission proceeding. While the inability to make advance payments might in some cases impede or prevent the Commission from obtaining desired participation, 31 U.S.C. § 529 clearly requires statutory authority for advance payments in this context. We note that such authority would be specifically provided by H.R. 13901 (page 5, lines 13-18) and S. 2715 (page 11, lines 4-9), supra.

We trust that the foregoing is responsive to the questions raised.

Sincerely yours,

R.F.KELLER

Deputy

Comptroller General
of the United States

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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D

FILE: B-139703

DATE: DEC 8 1976

MATTER OF: Costs of Intervention - Food and Drug Administration

DIGEST:

1. Food and Drug Administration may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation. B-92288, February 19, 1976, clarified.
2. Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding.
3. Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for participation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. § 529.
4. Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings.

The Acting Commissioner of the Food and Drug Administration (FDA) has requested our decision on certain questions raised by a petition filed by Consumers Union which has been published as an Advance Notice of Proposed Rulemaking in 41 Fed. Reg. 35855 (August 25, 1976).

In general terms the questions presented to us involve the extent of FDA's legal authority to provide financial assistance, in the form of attorneys fees and other expenses of administrative litigation to certain participants in its adjudicatory and rulemaking proceedings. Specific

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questions are raised concerning the criteria to be applied in determining eligibility for financing the expenses of participants under the terms proposed by Consumers Union in the light of prior statements by this Office on the subject in B-139703, July 24, 1972; B-92288, February 19, 1976; and a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976. See also, our opinion to several members of the Congressional Black Caucus in B-139703, September 22, 1976.

Our decisions in this area, referred to above, address the extent to which payments to parties and other participants in agency proceedings may be considered "necessary expenses" within the discretion accorded the Federal agency in carrying out its statutory functions. Thus we observed in B-92288, supra, with respect to the Nuclear Regulatory Commission (NRC):

"While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

* * * * *

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. * * *"

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The basic criteria to be applied were stated in B-180224, supra, as follows:

"* * * appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. * * *"

"We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines."

Our opinion in B-139703, September 22, 1976, concerning the Federal Communications Commission (FCC), elaborated upon these criteria:

"* * * FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed supra * * *.

"As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are 'necessary' to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person

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involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 [94th Congress] (page 3, line 15-page 4, line 12), and S. 2715 [94th Congress] (page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard."

The Consumers Union petition advocates the adoption of standards which would define eligibility for receipt of compensation for costs of participants as follows:

"(a)(1) The Commissioner may provide compensation for reasonable attorneys' fees, expert witness fees, and other reasonable costs of participation incurred by eligible participants in any rule making or adjudicatory proceeding conducted pursuant to Subparts B, C, D, and E of these regulations, whenever public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

"(2) Any person is eligible to receive an award under this section * * * for * * * participation (whether or not as a party) in a rule making or adjudicatory proceeding if

"(i) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests; and

"(ii)(a) The economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings; or

"(b) The person demonstrates to the satisfaction of the Commissioner that such person does not have sufficient resources available to adequately participate in the proceeding in the absence of an award under this section." (Emphasis added.)

FDA's specific questions concerning the proposal, and our responses, are as follows:

1. "Your decision concerning the Nuclear Regulatory Commission indicates that payments can be made if the agency determines that participation is 'essential' to dispose of the matter. We request your views on whether FDA may pay the costs of participants if FDA finds that the participation would be useful in disposing of a matter but cannot conscientiously find that the participation is 'essential.'"

While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent.

2. "Under the Consumers Union petition, assistance could be provided when public participation can 'reasonably be expected to promote a full and fair determination of the issues' and when the participant 'represents an interest the representation of which * * * can reasonably be expected to contribute substantially to fair determination * * *'. This standard seems to give special weight, in assistance determinations, to the role of the participant in representing consumers and other interests potentially affected by FDA decisions. We would appreciate your views on whether FDA may make awards solely to ensure that a potentially affected interest is represented, or may give the representational role of the participant special weight in deciding whether to provide financial assistance."

As noted in our answer to question 1, we perceive no legal objection to the proposed standard. Of course, it is the agency that must determine whether the standard has been met in particular cases, and the agency has considerable discretion in this regard.

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With respect to the second part of the question, the agency also has discretion in determining the value of a participant's representational role. We do not read the standard as requiring participation of all those representing consumers or other parties affected by FDA determinations unless the FDA also finds that such participation will substantially contribute to the full and fair disposition of the particular matters before it.

3. "Under the financial eligibility criteria in the petition, payment could be made to persons or organizations who have (or have members with) an economic interest in the outcome which is small in comparison with the costs of effective participation or who demonstrate they do not have sufficient resources to participate adequately. In a May 10, 1976 letter to Congressman Moss, your office indicated that payments may be made to a party who is 'indigent or otherwise unable to finance its participation.' We would like your views on whether payments under the financial criterion in the Consumers Union petition would be authorized."

As stated in our opinion in B-139703, September 22, 1976, supra:

"* * * our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the * * * [agency] must determine that both the participation itself and payment therefor are necessary. * * *"

We are still of the view set forth in our prior opinions that a regulatory agency may not pay costs of a party requesting to participate in a regulatory agency proceeding unless the agency first determines that the party is indigent or otherwise unable to finance its participation. Accordingly, it is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

Section 2.151(a)(2)(ii) of the proposed Consumers Union regulation would permit reimbursement for costs of participation either where lack of sufficient resources can be demonstrated or where:

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"* * * the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or, in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings * * *."

Since the latter standard, as quoted, is based on factors other than financial ability to participate in a strict sense, we must conclude that it is not acceptable under our prior decisions and in the absence of specific statutory authority.

Also, we note that the Consumers Union proposed regulation would permit advance payments in certain circumstances. However, unless FDA has specific statutory authority therefor, advance payments would be precluded by 31 U.S.C. § 529¹(1970). See B-139703, September 22, 1976, supra, at page 4.

4. "* * * the Consumers Union petition asks that awards be available for hearings in connection with rulemaking and adjudicatory proceedings, including public hearings before a public advisory committee pursuant to Subpart D of the proposed regulations on administrative practices and procedures published in the September 3, 1975 Federal Register (40 FR 40682). The NRC decision dealt only with costs of participation in an adjudicatory licensing hearing."

We see no basis for distinction in terms of the nature of agency proceedings for the purposes here relevant.

5. "Like the Nuclear Regulatory Commission, the Food and Drug Administration generally receives a lump sum appropriation for salaries and expenses. The Agency does not have any express statutory authority to use its appropriated funds specifically to assist participants.

"Any expenditure made by FDA to provide assistance to participants will also come within the scrutiny of the Congressional subcommittees responsible for our appropriations, i.e., the Subcommittees for Agriculture and Related Agencies of the House and Senate Appropriation Committees. We would appreciate your comments on whether we need to obtain the views of these subcommittees on this issue, or whether these subcommittees have expressed agreement with your position on this matter."

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Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval. Thus the question raised here is one of policy and the relationships between the agency and the subcommittees which we cannot resolve. Our Office does, of course, favor the greatest possible disclosure of spending activities to interested congressional committees and subcommittees.

In response to the final question, we are not aware that the subcommittees referred to have expressed any views on our opinions in this area.

R.F. KELLER

Deputy Comptroller General
of the United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD, TOWN OF :
GREENVILLE, TOWN OF DURHAM, NEW YORK :
and ASSOCIATION FOR THE PRESERVATION :
OF DURHAM VALLEY, :
Petitioners, : 76-4151, 4153
: -against- :
FEDERAL POWER COMMISSION, : AFFIDAVIT OF SERVICE
: Respondent. :
POWER AUTHORITY OF THE STATE OF NEW :
YORK, et ano., :
Intervenors. :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEPHANEY LLOYD, being duly sworn, deposes and says:
I have this day served two copies of the within Brief
For Petitioners Town of Durham and Association For The Preservation
Of Durham Valley on the following persons by depositing the same
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Stephaney Lloyd
STEPHANEY LLOYD

Sworn to before me this
8th day of March, 1977.

Andrea F. Gatti

ANDREA F. GATTI
Notary Public, State of New York
No. 31-4506477
Qualified in New York County
Commission Expires March 30, 1977